U.S. Department of Labor

Board of Alien Labor Certification Appeals
1111 20th Street, N.W.
Washington, D.C. 20036

Date issued: JUL 23 1990
Case No: 88-INA-239

In the Matter of:

VALLEY RANCH BARBECUE,
Employer

on behalf of

VICTOR S. HERANDEZ,
Alien

BEFORE: Brenner, Guill, Groner, Lipson, Litt, Marcellino, Romano, Silverman and Williams
Administrative Law Judges

JAMES GUILL
Administrative Law Judge

DECISION AND ORDER

This matter arises from a request for administrative-judicial review of a United States Department of Labor Certifying Officer's denial of labor certification.[1] Review of the denial of labor certification is based on the record upon which the denial was made, together with the request for review, as contained in an Appeal File (AF), and written arguments of the parties. See 20 C.F.R. §656.27(c).

Statement of the Case

In February 1987, Valley Ranch Barbecue Restaurant filed an application for labor certification on behalf of the Alien, Victor S. Hernandez, for the position of "cook" (AF 10-11). On the application form, Employer did not indicate that any experience was required (AF 10 at item 14), but when it advertised the position in the Los Angeles Herald Examiner and on the company bulletin board, it required two years of experience either in the the job offered or in the related position of assistant cook (see AF 16, 19, 21).

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[1] Labor certification is governed by §212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(14), and Title 20, Part 656 of the Code of Federal Regulations, 20 C.F.R. Part 656. Unless otherwise noted, all regulations cited in this Decision and Order are contained in Title 20, Part 656.

The Alien worked for Employer as an assistant cook from September 1973 until he was promoted to cook in February 1978. According to the Alien's application, he has no other relevant experience (AF 25).

In his Notice of Findings (NOF) of May 29, 1987 (AF 6-8), the Certifying Officer (CO) found that Employer's requirements of two years of experience as a cook or assistant cook were unduly restrictive, in violation of §656.21(b)(2). The CO stated that Employer violated §656.21(b)(6) by hiring the Alien without those minimum requirements, and that it cannot now require terms and conditions of employment that are less favorable to U.S. workers than those offered to the Alien. The CO stated that the Alien's only experience appears to have been with Employer and that the two titles of assistant cook and cook represent only one position. He added that the Alien had been trained to perform the basic job duties of the petitioned position, but that U.S. workers are not offered the same opportunity for training, as they are required to obtain training elsewhere and to have at least two years of prior experience.

In its July 1, 1987 Rebuttal (AF 4-5), Employer acknowledged that the Alien had no relevant experience when he was hired, and consequently had to be trained as an assistant cook. Employer added that when the Alien "became able to handle the job duties, he was given the position of cook" (AF 5), and that the two titles represent two positions (AF 4).

In his Final Determination of September 11, 1987 (AF 2-3), the CO again denied certification on the ground that Employer failed to submit evidence substantiating that the Alien held two separate and distinct positions with the Employer. The CO noted that, while the Alien's job title may have been ""assistant" during the training period, the duties of that position are the same as those of a cook.

Employer filed a request for administrative-judicial review on September 30, 1987 (AF 1), and a supporting brief on May 25, 1988. The Office of the Solicitor filed a May 25, 1988 letter in which the Board is urged to follow the decision of Vacco Industries, 87-INA-711 (Mar. 10, 1988, as amended Mar. 14, 1988).

Discussion

Section 656.21(b)(6) provides that the employer shall document that its requirements for the job opportunity represent the employer's actual minimal requirements for the job opportunity, and that the employer has not hired workers with less training or experience for jobs similar to that involved in the job opportunity or that it is not feasible to hire workers with less training or experience than that required by the employer's job offer. The requirements cannot include the same type of experience that the alien had acquired while working for the employer in that or a similar job. Apartment Management Co., 88-INA-215 (Feb. 2, 1989). If the experience was gained by the alien in jobs with the same employer, the employer must establish that the alien gained that experience in a job which was not similar to the job for which certification is sought. Brent-Wood Products, Inc., 88-INA-259 (Feb. 29, 1989).

Some relevant considerations on the issue of similarity include the relative job duties and supervisory responsibilities, job requirements, the positions of the jobs in the employer's job hierarchy, whether and by whom the position has been filled previously, whether the position is newly created, the prior employment practices of the employer regarding the relative positions, the amount or percentage of time spent performing each job duty in each job, and the job salaries. Delitizer Corp. of Newton, 88-INA-482 (May 9, 1990)(en banc).

In his NOF, the CO found that Employer had trained the Alien to perform the basic job duties of the petitioned position and that, in reality, the titles of assistant cook and cook refer to only one position (AF 7). In his brief, Employer asked the Board to look past the Employer's original job title for the Alien's prior job (assistant cook) and to concentrate on "the distinct prior position of a food preparer, making sauces to be used on meats and chickens" (Appeal brief at p.3). Indeed, as part of its brief, Employer asked the Board to remand this case so that Employer might place a new job order and advertisement requesting two years of experience as a food preparer (Id. at p.4).

Whether the Employer terms the job the Alien had from 1973 until he was promoted to cook in 1978 an assistant cook or a food preparer, it is clear that the Alien's prior position provided the training ground for his promotion. Before he became a cook, the Alien's job duties were to assist the cook in the preparation and barbecuing of all dishes included in the menu. Prior to his promotion to cook, the Alien prepared all the barbecue sauces used on the meats and chickens. In addition, he prepared various other items on the menu, including sandwiches, french fried potatoes, onion rings, baked potatoes, and cole slaw. He also used and cleaned the grills, ovens, grinders, slicers, mixers, bowls, and kitchen utensils (AF 25).

As is apparent from the Alien's statement of qualifications and from Employer's description of the duties for the job in question, the cook would perform all of the above-mentioned duties, with the exception of cleaning the equipment. There is little, if any, difference in the Alien's duties for the Employer prior to 1978 as assistant cook and thereafter as cook. The various statements of the duties of a cook for this Employer are not fully consistent in the Employer's description in its application form ETA 750 A (AF 10), the advertisement placed by Employer (AF 21) and the Alien's description of his duties as cook in form ETA 750 B (AF 25). Interpreting the several descriptions together in a way most favorable to the Employer, the only additions to the duties of cook seem to be cutting and trimming some of the meats, determining the length of time and method used in cooking the meats and chickens, and carving the short ribs and ham into individual servings.

Moreover, the position of cook as stated by the Employer entails no supervision of employees (AF 10). This appears inconsistent with the Employer's argument that prior to being promoted to cook in 1978, the Alien assisted the cook. Perhaps there is an explanation, but the Employer has not supplied one. Moreover, there is no explanation from the Employer that the apparently minor additional duties set forth for the cook position really show a significant dissimilarity in skill level and necessary training and experience between the two positions held by the Alien.

The Employer mistakenly relies upon Pollock, 86-INA-351 (Oct. 21, 1986), a pre-BALCA case, where the Administrative Law Judge (ALJ) stated that the fact that the Alien apparently got his experience while working for the Employer was not dispositive because the positions were separate and distinct. However, that is not the test under §656.21(b)(6). We note also that the ALJ in Pollock found significant differences between the job for which the Alien had been hired, that of a journeyman/carpenter, and the job to which he had been promoted and for which certification was sought, that of a construction foreman. In the case before us, the subtle differences between the Employer's job duties of an assistant cook and a cook, as noted above, do not permit the Employer to sustain its burden of proving that the Alien did not qualify for his position as cook by working in a similar position for which he was hired with less training and experience than the Employer is now requiring.

Employer has failed to demonstrate that its particular two jobs, assistant cook and cook, are sufficiently dissimilar so as to avoid the proscription regarding "similar" jobs of §656.21(b)(6) and justify the requirement of different qualifying experience. Nor has Employer attempted to show that it is not feasible to hire an applicant for its position with less training and experience than that being required. We find, therefore, that the Employer has failed to prove that it has complied with 20 C.F.R. §656.21(b)(6).

The Solicitor refers to Vacco Industries, supra, as implying that certification cannot be granted where the Alien received normally required experience with the same employer, even if the employer proves that the experience was obtained in an objectively recognized different job which is not similar to the job for which certification is being sought. We have held that to be an incorrect statement of the law. See Delitizer, supra, at ftn. 7.

ORDER

The Final Determination denying labor certification is hereby AFFIRMED.

At Washington, D.C. Entered: JUL 23 1990

By:
JAMES GUILL
Administrative Law Judge

JG/lg/trs